In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 514

WILLIE MCCARTY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on June 20, 1967. On July 26, 1967, petitioner filed an application for an extension of time within which to file a petition for a writ of certiorari. On July 27, 1967, Mr. Justice Black extended the time to August 19, 1967. The petition was filed on August 18, 1967. Since the application for an extension was not timely filed, the petition is out of time. Rule 34(2) of the Rules of this Court. There is, in any event, no occasion for further review.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of facilitating the transportation of illegally imported marijuana and transporting untaxed

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marijuana, in violation of 21 U.S.C. 176(a) and 26 U.S.C. 4744 (a)(2). On April 22, 1966 he was sentenced to imprisonment for five years, followed by probation for five years, and fined $1,000. The court of appeals affirmed (Pet. App.).

1. Customs Agent Glazener testified that approximately one week before petitioner's arrest he received information from a reliable informant, Sterling Haskins, that petitioner, who resided in Alice, Texas, would shortly be participating in the transfer of a quantity of marijuana (Tr. 69–71, 93, 96).[1] On January 15, 1966, Haskins telephoned Glazener and stated that the marijuana would be sent to Freer, Texas, between Laredo and Alice, and that petitioner would be proceeding to Freer that night or the next day to receive the shipment (Tr. 32, 69, 96–98). Haskins said that he, personally, would transport the marijuana from Laredo to Freer. Glazener immediately dispatched other agents to maintain surveillance of a restaurant parking lot in Freer, which Haskins described as the place where the delivery to petitioner would be made.

At 6 p.m. on January 16 Haskins advised Glazener that he was about to begin his journey (Tr. 75). Pursuant to their plan, Glazener met Haskins' car on the highway between Laredo and Freer, and followed it to the restaurant parking lot. There he observed Haskins meet petitioner, and remove two paper sacks from the trunk of his car. These sacks, compressed into squares five inches by eight inches, were placed in the

[1] The transcript of trial ("Tr.") has been filed with the Clerk of this Court.

trunk of petitioner's vehicle (Tr. 77–79). The cars left the lot simultaneously, heading in opposite directions. Petitioner's car was pursued and halted two miles southeast of Freer on the road to Alice. After he was "frisked" and a pistol removed from his person, petitioner was asked what he had in the trunk of his car. He replied that the trunk contained only personal belongings (Tr. 82). Petitioner complied with a request to open the trunk. He declared that the two paper sacks which lay therein were filled with dirty clothes (Tr. 83–84).[2] Glazener searched the sacks and found that they contained twelve pounds of marijuana (Tr. 85–87).

2. Petitioner testified that Haskins often frequented petitioner's barber shop, and borrowed small sums of money from him (Tr. 156). He stated that six months before trial, Haskins suggested to petitioner that he could earn a lot of money by trafficking in marijuana. Petitioner rejected Haskins' suggestion (Tr. 150). According to petitioner, Haskins persisted in his efforts to involve petitioner in a transaction involving marijuana, and on two occasions displayed marijuana cigarettes which he encouraged petitioner to smoke. Petitioner, however, continued to refuse to enter into any such venture (Tr. 151–161). Early in December, 1965, Haskins approached him with another idea. Purporting to have a contact in Mexico who could obtain diamonds, Haskins told petitioner that they could be brought into the United States and sold quickly at a 100% profit

[2] At first the petitioner told Glazener that a man in Alice had given him $10 to go to Freer and pick up the bundles of clothes (Tr. 85). He acknowledged at trial that this story was false (Tr. 203).

(Tr. 162). Petitioner at first turned down Haskins' new proposition, but changed his mind three weeks later (Tr. 163). He gave Haskins $400 on January 15, and was told to travel to the parking lot in Freer where he would pick up the diamonds, which would be wrapped in a bundle of clothes (Tr. 163). Petitioner did not desire to take the trip, but, on Haskins' representation that the arrangements which had already been made could not be changed, he agreed to go (Tr. 164). Petitioner thought that the packages placed in his car contained diamonds. While he "had an idea" that such an arrangement, promising to double his money in a short while, might be tainted with illegality, he had no reason to believe that the paper sacks would contain marijuana (Tr. 182, 202).

3. On several occasions during the trial, defense counsel indicated that they would claim entrapment (Tr. 94, 104–108). After all the evidence had been introduced, the trial judge advised counsel out of the jury's presence that he would not give an instruction on entrapment, because petitioner denied committing the offense. Instead, the judge charged the jury that its function was to determine the facts and that it was the "exclusive judge of the credibility of the witnesses and of the weight to be given their testimony" (Tr. 315–316). After reading the underlying statutes and defining such terms as "knowingly," "wilfully" and "with intent to defraud," the court reviewed the testimony of both sides, noting that petitioner's defense was that Haskins had misled him by putting marijuana in his car without his "knowledge or consent or permission" (Tr. 327–330). The court also charged:

You will recall I emphasized a while ago in defining certain terms to you the terminology—and I told you that the defendant was charged here with knowingly and unlawfully transporting and facilitating the transportation of the marihuana. So if the defendant was in fact under the belief that what he had in the back of his car and what he received from Haskins was diamonds or old clothes or anything other than marihuana he would not be guilty of this offense because he is charged with knowingly transporting the marihuana. If you find beyond a reasonable doubt that he had in fact possession of the 12 pounds of marihuana in the trunk of his car on the highway near Freer, as the customs agent told us, and if you find beyond a reasonable doubt that he knew or had good cause to believe that it was marihuana in the back of his car, it would be your duty to convict.

On the other hand, if you believe or have a reasonable doubt that he, in good faith, thought that it was anything else in the back of his car, then he would not be guilty and it would be your duty to acquit. [Tr. 330–331.]

* * * * *

The government, in its argument, argues to you that this story about the diamonds is pure fantasy and fiction dreamed up by the defendant in an effort to avoid the charge of knowingly, wilfully having the marihuana in its possession. The defendant argues to the contrary—they argue that his testimony is credible and worthy of belief and argue that if you have a reasonable doubt as to his knowing and willful pos-

session of the marihuana, you should acquit him [Tr. 334–335].

4. The sole issue raised by petitioner relates to the trial judge's refusal to charge the jury on the defense of entrapment. The court's decision was premised upon a failure of the evidence to warrant such an instruction. Following the rule in the Fifth Circuit, the court held that petitioner could not deny committing the offense charged and plead entrapment.

While, as petitioner points out, courts of appeal differ in their view as to whether an entrapment defense can be raised if the defendant does not admit that he committed the offense charged,[3] there is no occasion to resolve the conflict in this case. The evidence adduced at trial indicated that petitioner was not averse to participating in an illegal transfer. More important, petitioner's testimony, to the effect that he thought he was carrying diamonds, negatives the contention that he was entrapped into carrying marijuana. The issue requiring resolution by the jury was

[3] The majority of circuits hold that entrapment may not be claimed if there is a denial of the commission of the offense: *Martinez* v. *United States*, 373 F. 2d 810 (C.A. 10); *Ortiz* v. *United States*, 358 F. 2d 107 (C.A. 9), certiorari denied, 385 U.S. 861; *United States* v. *Carter*, 326 F. 2d 351 (C.A. 7); *Marko* v. *United States*, 314 F. 2d 595 (C.A. 5); *United States* v. *Pagano*, 207 F. 2d 884 (C.A. 2); *United States* v. *DiDonna*, 276 F. 2d 956 (C.A. 2); cf. *United States* v. *Alford*, 373 F. 2d 508 (C.A. 2); see also *Sylvia* v. *United States*, 312 F. 2d 145 (C.A. 1), certiorari denied, 374 U.S. 809. A contrary position was taken in *United States v. Baker*, 373 F. 2d 28 (C.A. 6); *Crisp* v. *United States*, 262 F. 2d 68 (C.A. 4). A District of Columbia case determined that, under the circumstances therein, the defenses were alternative rather than inconsistent: *Hansford* v. *United States*, 303 F. 2d 219 (C.A.D.C.).

whether petitioner's uncorroborated[4] contention that he had not known that the sacks contained marijuana was believable in the face of the prosecution's proof. The trial judge's charge to the jury was in precise accordance with, and gave full effect to, petitioner's evidence. Since the jury received guidance adapted to the issues as framed, and its verdict is supported by the evidence, further review is not warranted.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Petitioner had subpoenaed the informant, but did not call him to the witness stand at trial.

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